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IN THE

Supreme Court of the United States

October Term, 1964

No. 7

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JOHN BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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SUBJECT INDEX

Page

Preliminary statement 1

Interest of amici 1

Argument 4

I.

To preserve the Multi-Employer Bargaining Group from disintegration, nonstruck employers must be able to temporarily lockout employees and continue to operate with temporary replacements. Buffalo Linen recognized that economic pressures would destroy group bargaining, unless employers had the right to lockout; those same economic pressures would also destroy group bargaining, if the nonstruck members could not continue to operate but had to shut down 4

II.

The Court of Appeals properly denied the board's petition for enforcement because there is no evidence to support the board's finding of interference, restraint, coercion or discrimination. In the absence of such evidence, the board cannot conclude that the employer's continuing to operate after the lockout is discriminatory and coercive per se 9

Conclusion 14

TABLE OF AUTHORITIES CITED

Cases — Page

Food Giant Supermarkets, 145 NLRB No. 124 ....7, 8

Kroger Company, The, 145 NLRB No. 26 7

Morand Bros. Beverage Co. v. N.L.R.B., 190 F. 2d 576 5

NLRB v. Insurance Agents' International Union, 361 U. S. 477, 80 S. Ct. 419 .....12, 13

NLRB v. Makay Radio & Tel. Co., 304 U. S. 333, 58 S. Ct. 904 .....6, 9, 11, 12, 14

NLRB v. Teamsters, Local 449 (Buffalo Linen Supply Co.) 353 U. S. 87, 77 S. Ct. 643 .....4, 5, 6 .....7, 8, 9, 11, 13, 14, 15

Rules

Rules of the Supreme Court, Rule 42(2) 1

Statutes

National Labor Relations Act, Sec. 8(a)(1) 13

National Labor Relations Act, Sec. 8(a)(3) 13

National Labor Relations Act, Sec. 8(b)(3) 12

National Labor Relations Act, Sec. 9(c)(3) 6

Textbooks

28 University of Chicago Law Review, p. 614 5

37 New York University Law Review, p. 1152 5

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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS.

Preliminary Statement.

This Amici Curiae Brief in support of Respondents is filed pursuant to Rule 42(2) and pursuant to the written consent of Petitioner and Respondents previously filed herein.

Interest of Amici.

Multi-employer bargaining groups throughout the United States and particularly the associations of employers, who are amici here, are vitally concerned with the decision of the Board in this case: they believe that the Board's decision, if sustained, would sound the death knell for multi-employer bargaining. The interest of amici is very simply in the survival of multi-

employer bargaining practices and relationships which have proved beneficial to both unions and employers for many years.

Amici are employer associations, large and small, who represent a great variety of employers in multi-employer bargaining units throughout a large part of California.

The adverse effect of the Board doctrine, not only on employers, but upon neutrals and the public, is enormous. The drastic consequences are well illustrated by a pending case arising from a recent strike in Los Angeles by building service employees against certain markets represented by Food Employers Council, Inc., one amici here. In an effort to divide and conquer, the union struck a single employer having approximately 50 building service employees. The other employers in the unit responded to the whipsaw by lockout out approximately 700 building service employees. However, if the employers had shut down completely, as the Board says they must, they would have been compelled to lay off approximately 28,027 other employees represented by numerous unions: Retail Clerks (19,969 employees); Meat Cutters (4,123); Teamsters (1,818); Culinary (601); Bakery & Confectionery (541); Machinists (30); Operating Engineers (26); Provision House Workers (8); incidental unions (163).

In addition, the employees of hundreds of supplier firms, strangers to the dispute, would also have been put out of work as the markets closed down and deliveries ceased. Inevitably, the impact on consumers would have been to deny them food and conceivably a serious food shortage could have resulted.

Nor can it be suggested that the Board doctrine only requires that employers cease those operations involv-

ing building service employees. For such work is essential for the markets to remain open: Lights, heat, safe and sanitary premises are absolutely essential. In other words, if the building service employees' work could not have been done by supervisory help or by temporary replacements, the markets would have had to completely close.

Thus, the Board would require that a labor dispute involving a few hundred employees be expanded into one involving many thousands of employees who have no interest in the dispute. The increased consequences for the public of a major labor dispute are obvious. This example could be multiplied many times by reference to the hundreds of multi-employer bargaining groups in which amici participate.

Group bargaining, the primary activity of amici, is under violent attack here. For if the Board's doctrine becomes the law, the rights guaranteed by *Buffalo Linen* become illusory. The multi-employer group becomes a myth and the union's whipsaw tactics become a revitalized weapon against which there is no defense.

Whatever its faults, group bargaining has proved beneficial to employers and unions alike. Only by means of group bargaining can many employers, particularly small employers, hope to deal with unions with any degree of equality. Parity of bargaining power simply cannot exist under the Board's decision.

For these reasons, the interests of amici is obvious. Literally thousands of employers, large and small, members of amici, will have to abandon long standing multi-employer bargaining practices and relationships, thereby becoming unable to attain and maintain the parity of bargaining power which Congress intended to afford.

ARGUMENT.

I.

To Preserve the Multi-Employer Bargaining Group From Disintegration, Nonstruck Employers Must Be Able to Temporarily Lockout Employees and Continue to Operate With Temporary Replacements. Buffalo Linen Recognized That Economic Pressures Would Destroy Group Bargaining, Unless Employers Had the Right to Lockout; Those Same Economic Pressures Would Also Destroy Group Bargaining, if the Nonstruck Members Could Not Continue to Operate but Had to Shut Down.

This Court in the landmark *Buffalo Linen* case of 1957 authorized the use of the lockout by multi-employer groups to protect the integrity and unity of the group and their interest in group bargaining. *NLRB v. Teamsters, Local 449 (Buffalo Linen Supply Co.)*, 353 U. S. 87, 77 S. Ct. 643 (hereafter *Buffalo Linen*). As in the case at bar, the nonstruck members of a multi-employer unit locked out their employees to defeat the whipsaw tactics of the union. This Court held that the employers could rightfully engage in a "temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action. . . ." 353 U. S. at 97. The Court's opinion is supported by an extensive review of the legislative history of the Act. The Court specifically reversed the Second Circuit on the question of whether Congress had sanctioned bargaining by multi-employer groups declaring that Congress had indeed sanctioned such bargaining.

It is to be noted, in passing, that the Court also refused to define the limits of the legitimate use of the lockout and reserved judgment on the question of whether the right to lockout is the corollary of the right to strike. Compare *Morand Bros. Beverage Co. v. N.L.R.B.*, 190 F. 2d 576 (7th Cir. 1951); Meltzer, Lockouts Under the LMRA: New Shadows on Old Terrain, 28 U. of Chi. L.R. 614; 37 N.Y.U. L. Rev. 1152. It is not necessary to decide that question here. However, the Board's brief proceeds and rests upon the unsupported assumption that employers have no such corollary right to lockout.

Whatever else *Buffalo Linen* did or did not decide, it certainly did uphold the employers' right to lockout to preserve the multi-employer bargaining group. The crux of *Buffalo Linen* is that multi-employer bargaining cannot survive without the right to lockout in defense against union whipsaw tactics. Consider a typical whipsaw situation where the union strikes one employer only. If the other employers then could not stick together (*i.e.*, if they could not lockout), the isolated employer would be the target of all the union economic coercion, and the unity of the group would most certainly be shattered. By the divide-and-conquer strategy, the union also could isolate the employer most vulnerable to the pressure of a strike and concentrate overwhelming pressure on him. After defeating this employer, the union could then proceed to pick off other employers one by one until all were forced to surrender. This Court rightly recognized that economic realities made it imperative that employers have the right to stand together; that is, employers must have the right to consider a strike against one as a strike against all, and

must have the right to lockout, rather than be decimated one by one. Even the Board in the case at bar recognizes this: "If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the 'whipsaw'." These are the economic pressures which the Court in *Buffalo Linen* held to necessitate the right to lockout to preserve the bargaining group.

Turning to the case at bar, again suppose that the union strikes one employer only. The Board concedes that the struck employer may hire replacements and continue to operate. The right of struck employers to operate with replacements has been unquestioned since 1938. *NLRB v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 58 S. Ct. 904 (hereafter *Mackay*). In 1947, Congress gave statutory recognition to this right in Section 9(c)(3) of the Act and the Landrum-Griffin Amendments of 1959 did likewise.

According to the Board, however, the nonstruck members of the employer unit find themselves in a vastly different position. They are tendered a Hobson's choice, namely:

1. they can take the strike (doing nothing, leaving the single employer isolated, and awaiting their turn); or

2. they can shut down completely, and cease operations.

This Court has said, and the Board concedes, that the first course would be fatal to group bargaining. The second course would likewise be fatal to group bargaining.

What pressures would tend to destroy group bargaining if the second course, that of complete shutdown, were followed? The Board has failed to consider, let alone answer, this question.

According to the Board only the struck employer could continue to operate. With his competition shut down, he might do very well indeed. At the same time, the shut down employers would be suffering enormous losses. All of their fixed costs, such as rent, property taxes, interest and overhead, would continue, as would many of the variable costs. The economic pressures would be irresistible for the nonstruck employers to end the lockout and to leave the struck employer to take the strike alone.

Therefore, precisely the same economic pressures, found persuasive in *Buffalo Linen,* work here to disintegrate the bargaining group. These pressures could only result in the destruction of the bargaining group. If, as this Court has held, these pressures are sufficient to necessitate the right to lockout, they are sufficient to justify the right to continue to operate. The Board gives no consideration to this point. In fact, the Board rejected the offer of evidence respecting the economic necessity of the markets to continue operating. Without any discussion, the Board majority merely concludes that the employers operated with replacements "not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike."

Likewise, in other similar lockout cases, the Board has failed to consider the economic realities which make continued operation necessary. See, for example, *Food Giant Supermarkets,* 145 NLRB No. 124; *The Kroger Company,* 145 NLRB No. 26. In

Food Giant, the record showed without contradiction that unless the employers locked out, the struck employer would have been forced to make a separate agreement with the union, thus destroying the group of four employers; the record further showed that at least one of the employers could not possibly have ceased operating without going completely out of business. The employers there simply had no choice but to lockout and continue operations. Nevertheless, the Board devoted not a single word in its opinion to these factors, In such cases, the Board has apparently considered evidence of economic hardship to be irrelevant. In its brief here, the Board states that such economic factors merely demonstrate that in some industries "a lockout may be more expensive as an employer weapon". (Board Br. p. 14.) That argument misses the point. The question is whether the Board can impose conditions which make the lockout so expensive that it ceases to be available as a defense against the whipsaw.

The Board's position is insupportable. It would, as the court of appeals stated, render illusory the rights guaranteed by *Buffalo Linen.* Since the principle of multi-employer bargaining has the sanction of Congress and since it cannot survive without the right to operate after locking out, the employers' conduct here was privileged under the rationale of *Buffalo Linen.*

In this Court, the Board for the first time has suggested a possible third alternative for non-struck employers, that of a partial lockout: the non-struck employers would continue operations at a level "comparable to that of the struck employer". (Board Br. p. 13.) Such a partial lockout finds no sanction in any Board decision. Can it be doubted that the Board

would hold such a partial lockout unlawful if such a case should ever reach it for decision? Obviously, a partial lockout offers greater possibilities for abuse than an impartial lockout, applied to all employees alike. Indeed, a partial lockout is inconsistent with the Board's opinion in the case at bar. For the Board's opinion reasons that there was no economic necessity for employers to continue operating and that therefore such action must have been retaliatory and discriminatory. If there was no economic necessity for the employers' action, how can a partial lockout be justified? The suggestion of a partial lockout amounts to belated recognition by the Board that employers must be allowed to continue operating.

It is submitted that this Court should reaffirm the rights that flow from *Buffalo Linen* and *Mackay* rather than deny those rights on the ground that the Board may someday sanction the ill-considered alternative of a partial lockout.

II.

The Court of Appeals Properly Denied the Board's Petition for Enforcement Because There Is No Evidence to Support the Board's Finding of Interference, Restraint, Coercion or Discrimination. In the Absence of Such Evidence, the Board Cannot Conclude That the Employer's Continuing to Operate After the Lockout Is Discriminatory and Coercive Per Se.

There is no evidence in the record of any anti-union acts or motivation by the employers. On the contrary, relations between the parties in the past have been exemplary. The strike was settled quickly and normal operations were resumed without animosity on either

side. The temporary replacements were terminated and the regular employees were recalled without friction.

Nevertheless, the Board says that there was unlawful discrimination and coercion because the employers locked out their "employees in order to replace them with other workers"; that ". . . since no reason appears why they could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activities. . . ." The Board assumes there was no need for the employees to lockout and continue operating. The Board concludes that "it may be reasonably inferred that they do so . . . for the purpose of inhibiting a lawful strike."

To say, as does the Board, that because the employers did not shut down, that they must have intended to discriminate or to coerce is simple nonsense. The employers had every good reason and necessity to keep the doors of their markets open, and these reasons are wholly independent of any anti-union discrimination or coercion. After all, rent and property taxes continue; utility bills must be paid; finance charges do not stop; all of the fixed costs and many of the variable costs of doing business in a competitive industry go on; anticipated profits are lost. Nor would the non-struck employers wish to commit business suicide by shutting down while their struck competitor continued to operate. Yet, the Board concludes that since they did not shut down, they discriminated against and coerced their employees. This supported conclusion cannot supply the evidence demanded by the Act. There is no evidence,

much less the substantial evidence required by Section 10(e).

The dissenting members of the Board state the point succinctly:

> "The portion of the statute here involved speaks of *discrimination:* to find a violation of Section 8 (a) (3) some form of *discrimination* must be found. The only conceivable discriminatory action in the present case, the association-wide lockout, has been found privileged by the Supreme Court. To 'infer' unlawful discrimination, as does the majority, from the performance of the further act of temporary replacement, which does not in itself discriminate against employees, causes us to suspect that the majority's real quarrel is with the Supreme Court's holding in *Buffalo Linen* that the discrimination inherent in the original lockout was privileged." (Emphasis that of dissenting opinion.)

In addition, the right to hire replacements during a strike and to continue to operate has long been recognized. *NLRB v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 58 S. Ct. 904 (1938). This right to operate with replacements, coupled with the right to lockout, affirmed in *Buffalo Linen,* wholly justifies the conduct of the employer group here.

There is no basis for drawing a distinction in the context of multi-employer bargaining between the rights of struck employers and non-struck employers to hire replacements. If employers are entitled to treat a strike against one as a strike against all, then *Mackay* applies equally to all employer members of the bargaining unit. The Board's attempt to avoid the impact of

Mackay by saying that the holding does not apply where employees are willing to work is ridiculous. They are willing to work only to implement the whipsaw.

The Board seeks in its majority opinion and in its brief to gloss over these fatal deficiencies and to foreclose judicial review by asserting that:

1. the Board was balancing conflicting interests; and

2. the striking of such a balance has been committed to the peculiar competence of the Board.

Those assertions were rejected by this Court in a highly analogous case, *NLRB v. Insurance Agents' International Union,* 361 U. S. 477, 80 S. Ct. 419 (1960) (hereafter *Insurance Agents*). In effect, the Court stated there must be substantial evidence of the alleged violation of the Act and that assumptions or conclusions by the Board cannot take the place of evidence.

In *Insurance Agents,* the Board had found an 8(b)(3) refusal to bargain violation by the union although the parties had negotiated at great length. The Board found a violation because the union exerted pressure on the employer by engaging in harassing tactics: employees reported late, refused to attend scheduled conferences, refused to follow directions or to write new business. There was no evidence of a refusal to bargain other than engaging in these tacties of economic warfare.

Justice Brennan emphasized that the Act contemplates economic struggle as the ultimate recourse for labor and management. He stated that Congress did not give the Board the power to choose the weapons

each side could use in that struggle. Thus, in reversing the Board, the Court held the use of harassing tactics was nothing more than the employment of an economic weapon. The union's conduct did not itself prove a refusal to bargain; rather, it was wholly consistent with good faith bargaining.

The Court warned that the Board could not, under the guise of determining a violation of the Act, enter the battle arena and attempt to dictate the weapons available to the parties. Justice Brennan specifically rejected the Board's special competence to choose the weapons in the economic struggle. The concurring opinion of three justices emphasized the absolute necessity for evidence to support the Board's finding. The concurring opinion condemned the Board's *per se* proscription of conduct and characterized the Board's action as one of applying an erroneous rule of law, rather than doing its job of evaluating evidence.

The principles of the *Insurance Agent* case are peculiarly applicable here. The Respondents did nothing other than try to survive in the face of the Union whipsaw. The Board, under the guise of finding 8 (a) (1) and 8 (a) (3) violations has actually entered the economic struggle on the side of the union; it is obviously attempting to deny the weapon of lockout to employers, in patent disagreement with *Buffalo Linen*. Faced with a total absence of evidence of discrimination or coercion, the Board is attempting to substitute an erroneous rule of law for that evidence, namely, its unsupported conclusion that continuing to operate after a lawful lockout is *per se* discriminatory and coercive.

Here, the Board did not carefully balance conflicting interests. Here, the Board did not even allow the nature of those interests to be litigated. Here, the Board rejected Respondents' offer of evidence respecting the economic necessity for the markets to continue operating. The Board gave no consideration to the fact that the problem is all the Union's making: the Union alone chose to ignore the bargaining unit, to invoke the whipsaw, and to isolate the weakest employer. The Board made no attempt to balance the Union's right to whipsaw with the employers' right to stick together. Plainly, the Board balanced nothing, but, rather, applied a *per se* rule.

The Board's findings are not supported by substantial evidence. Therefore, the Court of Appeals properly denied the Board's Petition for Enforcement.

Conclusion.

The Board, in transparent disagreement with *Buffalo Linen* and *Mackay,* seeks to emasculate those cases.

The Board's findings are not supported by any evidence at all. The Board merely condemns the employers' continuing to operate after a lawful lockout as discriminatory and coercive *per se.* This erroneous *per se* rule of law cannot take the place of the substantial evidence demanded by the Act. Non-struck members of multi-employer groups must be able to lockout and must be able to operate or their bargaining groups will be destroyed. The reasons found persuasive in *Buffalo Linen* to preserve the bargaining group are equally persuasive here. If the Board's opinion becomes the law of the land, multi-employer bargaining is at an

end. Therefore this Court should reaffirm the rights that flow from *Buffalo Linen* and *Mackay*.

Respectfully submitted,

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